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MICHAEL NODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1418

WILLIAM E. BLOOMER, JR.,

Petitioner,

—against—

LIBERTY MUTUAL INSURANCE COMPANY, as
subrogee of CONNECTICUT TERMINAL COMPANY,

Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Question Presented for Review

Respondent agrees with the statement of the issue presented as set forth on page 6 of petitioner's Brief.

Statement of the Case

Respondent Liberty Mutual likewise is in agreement with the statement of the case as set forth on pages 6-8 of the petitioner's Brief and proposes no counterstatement.

ARGUMENT

The Court below properly construed Congressional intent in disallowing an attorney's fee.

That the district court and the Court of Appeals for the Second Circuit correctly interpreted Congressional intent can be seen by looking at the history of the LHWCA, the legislative history of the 1972 amendments, the provisions of the Act itself and recent decisions construing it.

A. History

Following the enactment of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901 et seq. (hereinafter, "Act") in 1927 the employer-stevedore's liability for work related injuries was limited to the compensation provided for by the Act. However the longshoremen's remedies against third parties were preserved. A longshoreman could receive compensation and recover damages if successful in an action against the ship owner, 33 U.S.C. 933 (amended 1972). In order to prevent a double recovery in such a situation, the Courts imposed a lien in favor of the employer on the longshoremen's tort recovery up to the amount of the compensation payments. *The Etna*, 138 F. 2d 37 (3rd Cir. 1943); *Fontana v. Pennsylvania Railroad*, 106 F. Supp. 461, aff'd.

sub nom *Fontana v. Grace Line, Inc.*, 205 F. 2d 151 (2d Cir.) cert. den. 346 U.S. 886 (1953).

In 1946 in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, this Court held that a longshoreman is engaged in traditional seaman's work and therefore entitled to the benefit of the ship owner's warranty of seaworthiness. Because of the absolute nature of this imposed liability for longshoremen's injuries, ship owners attempted to shift the burden of liability by seeking complete indemnity from the stevedore whenever the injured employee's injuries were caused by a breach of the stevedore's warranty of workmanlike performance. Finding that this warranty was the "essence" of the stevedoring contract this approach was upheld in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). This indemnity action was not barred, said the *Ryan* Court, by the exclusive liability section of LHWCA since such an action was predicated solely upon a duty running from the stevedore to the ship owner. Thus the courts were besieged with longshoremen's personal injury suits and the stevedore often would be held liable for the total amount of damages. It became necessary for Congress to make an adjustment because the judicially imposed no fault liability did not offer the compensating factors available in a legislatively established workmen's compensation system.

B. Legislative history of the 1972 amendments.

When it enacted the 1972 amendments Congress repudiated the application of a no fault standard of recovery except against the stevedore.

Both the Senate and House Committee reports demonstrate that the overriding concern in enacting the 1972

amendments was the fashioning of an effective workmen's compensation scheme which would not only provide injured workers with adequate compensation, but would diminish the number of third party actions and thereby provide resources to help finance the increased compensation benefits. The Senate Committee Report states:

"The Committee heard testimony that the number of third party actions brought under the *Sieracki* and *Ryan* line of decisions had increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. S. Rep. No. 1125, 92d Cong., 2d Sess. 9 (1972), reprinted in (1972) U.S. Code Cong. and Admin. News 4703.

The same report also noted that such third party litigation had an impact on the backlog of personal injury cases in federal district courts.

Accordingly the committee felt that given the vast increase in compensation benefits which the amendments provided there was no longer any reason to require ship owners to assume what amounted to absolute liability for injuries to workers covered by the Act while working on their vessels. There were political considerations which prevented the inclusion of ship owners under the umbrella of immunity from tort liability provided to stevedore employers. However, despite the fact that ship owners were still to be liable to suits brought by injured longshoremen, the grounds for recovery would be limited to their own negligence.

The Senate Committee report also emphasizes the costs of pre 1972 litigation and the effect on benefits:

"The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in the actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that the injured workers would be properly protected by the Act. At the same time employer groups indicated they could do so only if the Longshoremen's and Harbor Worker's Compensation Act were to again become the exclusive remedy against the stevedore as it has been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the Committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." S. Rep. No. 92-1125, 92d Congress, 2d Sess. 4-5 (1972).

C. The provisions of the Act

Surveying provisions of the amended Act as well the legislative history above, it is apparent that the intent of Congress was to create strictly a worker's compensation scheme in place of all other liability for the stevedore employer. Congress intended to keep the stevedore out of court.

First, the benefit levels are high. In 33 U.S.C. 906 (b) (1) the maximum benefit level is 200% of the national average weekly wage. This determination of the average wage is made annually and was obviously intended to keep benefit levels current with inflation. Few compensation statutes are so indexed for inflation. Therefore by setting such high levels and keeping them current Congress obviously intended that such payments should be, in the overwhelming majority of cases, the only source of compensation for an injured longshoreman. Aware that such high benefit levels would be expensive to fund Congress sought to relieve the employers from any other expenses. If this Court reverses the Second Circuit there will obviously be additional expenses incurred by the employer since it will not be able to recoup its entire lien in the event of a third party recovery but have to share it with the longshoreman's attorney.

That it was Congress' intent to have the stevedore recover its full lien in all cases is clearly shown by the formula set out in 33 U.S.C. 933 (e). There, if the employer by action of its own recovers against a liable third person it is entitled to retain not only its expenses and a reasonable attorney's fee, the cost of all benefits and compensation paid or payable, it is entitled to one fifth of any excess over such amounts, the remainder going to the injured employee. While Congress may not have been aware that it was not the normal business practice of stevedore employers to bring such claims against their customers, Congress' intent to provide a system of full recoupment for employers cannot be more plain. The same result should obtain if the employee brings the suit.

Petitioner (Brief page 17) makes the point that the employer gets a free ride if the longshoreman brings the suit and is not required to contribute to the attorney's

fee, since the employer would have to risk the possible loss of an attorney's fee if it brought an unsuccessful action. However, there is no reason why an employer could not hire an attorney on a contingent fee basis and pay no fee if there is no recovery just as the employee can. Moreover, the employer does not get a "free ride". If the employee's suit is successful the employer is recouping only what the Act mandates that it is required to pay an injured longshoreman. These benefits are high and designed to provide close to full wage replacement as well as attendant medical and rehabilitation benefits. If the employee as a result of a third party action recovers additional monies that is all to his good, but it should not be at the expense of his employer who is mandated to pay benefits without regard to fault. Perhaps something indeed is taken away from the overall amount of money which that particular injured longshoreman will receive as the result of his injury, but requiring the stevedore employer to make an additional contribution by way of reduction of its lien only serves to penalize the entire body of employees, to enrich one employee, and to reduce the employer's resources for the payments of possible benefits to its other employees.

Moreover, if the attorney is to be awarded a portion of the lien recoupment it would have to be done in a Court proceeding. This would be inconsistent with the purposes of the Act in two respects. It would drag the stevedore employer needlessly into Court in an effort to contest the amount of the attorney's fee and keep it at a minimum. It would also be inconsistent with 33 U.S.C. 933 (e) which requires that the Deputy Commissioner approve the amount of the attorney's fee in employer initiated actions. That provision seems to indicate an intent by Congress to oversee the amount paid by the employer in attorneys' fees and do it within the context of the compensation

scheme. If a judge is to set the amount of the fee in an employee initiated suit the Deputy Commissioner has no control over that fee and cannot exercise a control of its reasonableness nor will he be able to provide uniformity throughout the country.

Congress' intent that the compensation scheme operate without the burden of attorneys and their fees is shown in the four subsections of 33 U.S.C. 928. Subsection (a) provides for an award of a reasonable attorney's fee if the employer contests the claim, the claimant *thereafter* utilizes the services of an attorney and then is successful in receiving an award of compensation (Emphasis added).

Subsection (b) provides that if the employer tenders payment of compensation without an award and then a controversy develops over the amount of additional compensation claimed the Deputy Commissioner is required to hold a conference and make a recommendation as to the additional compensation if any to which the employee is entitled. If the employee refuses this recommendation, *thereafter* hires an attorney and receives an award greater than the amount tendered, a reasonable attorney's fee based upon the difference is to be awarded (Emphasis added).

Subsection (c) provides for approval in all cases of fees of attorneys representing a claimant.

Subsection D provides that in cases where an attorney's fee is awarded against an employer the employer may also be assessed other costs attendant upon the holding of a hearing at the instance of the claimant.

Congress' specific treatment of attorneys' fees in the foregoing instances indicates clearly its desire to have these elements in the compensation scheme under strict control. They are to be awarded only in limited instances

and are subject to approval. The statutory scheme appears to indicate that attorneys should not be necessary except in the event of a controversy, and even then, only in the event that claimant is successful. The intent is obviously to protect the employers' resources except in those instances where the end result proves that the employee was correct in pressing his claim over a contest.

Amicus, The Association of Trial Lawyers of America, argues (Brief pp. 20-21) that since this is one of the few statutes of its kind allowing fees to be paid at the carriers' expense that it is meant to encourage good lawyers to spend the necessary time and effort to secure a claimant's rights. To the contrary, the statute seems to be designed to discourage participation of lawyers and encourage the voluntary payment of compensation without contests. The Statute does not contain, an inducement for the lawyers to take third party actions. It is neutral on this point. What is clear is that the attorneys' fees which under pre-amendment law became an uncontrollable expense to the employer, are now intended to be kept under strict control and scrutiny in order to preserve the employer's assets for the voluntary payment of the high benefit levels.

D. Recent Supreme Court decisions are in accord with respondent's position.

In addition to the legislative history and the provisions of the statute itself, recent decisions by this Court are in line with the position advocated by respondent. For example in *Edmonds v. Compagnie Generale Transatlantique*, — U.S. —, 61 L Ed 2d 521 a federal district court jury had determined that a longshoreman in his suit against the ship owner had suffered total damages

of \$100,000., that he was responsible for 10% of the total negligence, that the ship owner was responsible for 20% and that the stevedore's fault through a co-employee's negligence was 70%. The District Court reduced the award to the longshoreman by the 10% attributable to his own negligence but refused to further reduce the award against the ship owner in proportion to the fault of the stevedore-employer. In the 4th Circuit Court of Appeals there was a reversal on the ground that the 1972 amendments had altered the traditional admiralty rule by making the ship owner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. In reversing the 4th Circuit this Court recognized that it was dealing with a combination of statutory and judge made law. It found that in 1972 Congress aligned the rights and liabilities of stevedores, ship owners, and longshoremen in light of the rules of maritime law that it chose not to change. The majority of this court felt that the Congress was well aware of the pre-existing judicially created rule that the ship owner was responsible for all the damages not due to the plaintiff's own negligence. It said:

"By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances." (61 L Ed 2d 521, 535).

So too here the court should not upset pre-existing judge-made principle of maritime law that the employer should have the first claim, after attorneys' fees and expenses, for recoupment of its lien and that it should not have that lien subject to any reduction for litigation expenses. *Ballwanz v. Jarka Corp.*, 382 F. 2d 433 (4th Cir.

1976); *Ashcraft & Gerel v. Liberty Mutual Insurance Company*, 343 F. 2d 333 (D. C. Cir. 1965); *Haynes v. Rederi A/S Alladdin*, 362 F. 2d 345 (5th Cir. 1966). It must be presumed that Congress was well aware of these cases when it passed the 1972 amendments since they were all decided after the 1959 amendment, 33 U.S.C. 933, which permitted the injured longshoremen to maintain an action in his own name after acceptance of compensation benefits. Congress also added at that time the allocation formula for distribution of any recovery made by the employer in 933 (e). If Congress was dissatisfied with the judge made rule which developed in the ensuing 13 years, giving the employer complete recoupment of its lien where there was a sufficient recovery, it could have made changes in 1972. It did not do so. This court in *Edmonds* decided that it should "stay its hand" in areas that Congress did not see fit to change, and the same reasoning should apply here. As this court has said:

"Once Congress has relied upon conditions that Courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned." (61 L Ed 2d 521, 535).

In *Director, Office of Workers' Compensation Programs v. Rasmussen*, — U.S. —, 59 L Ed 2d 122 this court was required once again to look into the legislative history of the 1972 amendments to determine Congress' intent in establishing a completely new formula for determining disability benefits, yet leaving unchanged the formula for determining death benefits. It was argued that the omission of a maximum limitation on death benefits such as that placed on disability benefits was inadvertent.

This Court was urged to read into the Act a maximum on death benefits in order to avoid discriminatory consequences. In the unanimous opinion however, this Court felt that the omission of Congress was intentional and it was not permissible to rewrite Congress' words (59 L Ed 2d 122, 135).

In the case at bar, petitioner would have this Court rewrite the legislation in a situation where Congress relied upon the state of the law as it existed when the 1972 legislative corrections were made. As it has in the two cases cited above the Court should once again stay its hand.

One other circuit has taken the position of the court below and that advocated by respondent. In *Cella v. Partenreederei MS Ravenna*, 529 F2d 15 (1st Cir. 1975) the court concluded that the Congressional intent was to "strictly limit the liability of the stevedore in order to husband its resources and its insurance carriers resources for payment of increased benefits . . . Awarding an attorney a fee out of that portion of a third party tort settlement which goes to reimburse the employer would contravene that purpose. It would cause a reduction in the amount which the employer can legitimately call upon to find its obligation toward injured workmen . . . We conclude, in accordance with the intent of Congress, that reimbursement funds undiminished by attorneys' fees should be available to fund the compensation of workmen whose injuries cannot be charged to the tortious conduct of third parties" (529 F2d at 20-21).

Neither *Swift v. Bolten*, 517 F. 2d 368 (4th Cir. 1975), nor *Mitchell v. Scheepvaart Mattschappij Trans-Ocean*, 579 F. 2d 1274 (5th Cir. 1978), devote much attention to examination of the legislative intent. In *Mitchell* where

the Court does devote some attention in its decision to the intent, there is some reasoning which is questionable. The *Mitchell* Court finds fault with the reasoning in *Cella* saying at page 1280: "First, the surest means of preserving workmen's compensation funds is the encouragement of proper third party suits based on negligence." There is no factual basis for such statement and it is purely ad hoc reasoning. Common sense and experience indicate that the great majority of longshoremen's injury cases do not present opportunities for third party recovery based on negligence or any other theory. The surest means for preserving compensation funds is what Congress directed itself to in 1972, namely reduction of the stevedore-employer's liability to double recoveries.

The Court also reasons at page 1280: "A policy of assuring just compensation for attorneys who represent plaintiffs in such actions should serve as an important safeguard for the eventual reimbursement of compensation payments made to a longshoreman injured through a third party's negligence." Again, the Court's reasoning is questionable. Whether or not third party actions are brought or not will be based as always on a variety of factors; the severity of the injury, an estimate of the degree of liability of the prospective defendant, and an estimate of the possible net recovery over expenses. A holding by this court allowing the employer complete recoupment will as amicus Master Contracting Stevedore Association argues (brief pp. 12-14) discourage marginal litigation by increasing the expense factor and reducing the net recovery. This will not be a great loss to injured longshoremen, because it will be mainly the smaller cases that fall by the wayside. The larger case where the injury is more severe and the potential recovery greater will continue to be pursued.

Adoption of the position taken by respondent will, of course, not preclude the courts from fashioning allocations where the third party recovery is insufficient to pay expenses, including the plaintiff's attorney's fee and the employer's full lien such as in *Valentino v. Rickners Rederi G.M.B.H., SS Etha*, 552 F2d 466 (2nd Cir. 1977). It is quite possible the Congress in 1972, while clearly indicating its intent that the employer's resources be protected against claims for attorney's fees, made no provision for lien recovery in longshoremen initiated suits because it did not want to tie the hands of courts in such instances.

Perhaps in such cases a hearing might be held or affidavits submitted to the court by interested parties to aid the court in making the proper allocation. Where the recovery is sufficient to satisfy expenses and the employer's lien intervention by the court, which *Mitchell* says should be done in each case, is unnecessary. The employer should not have to argue for its lien recovery and it should be kept out of court in consonance with Congressional policy.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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